United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

937

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,083

SAMUEL B. LEWIS, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

506 E Street, N.W.
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Washington, D.C.
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QUESTIONS PRESENTED

1. Whether, in a trial for robbery where the Government's case rested solely on eyewitness testimony, it was error for the trial court to refuse to exclude as impeaching evidence defendant's six prior convictions for robbery and one for assault with intent to commit robbery, when all seven prior crimes had been committed on the same day in 1953?

2. Whether the trial court erred in refusing to hold a hearing to permit inquiry into the circumstances of appellant's lineup, after appellant's counsel had requested such a hearing, and where four of six eyewitnesses testified to having previously identified appellant at the police lineup?

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JURISDICTIONAL STATEMENT

Appellant was indicted in the United States District Court for the District of Columbia, in Criminal No. 723-65, a four-count indictment charging robbery (D.C. Code § 22-2901, assault with a dangerous weapon (two counts under D.C. Code § 22-502), and carrying a dangerous weapon (D.C. Code § 22-3204). He entered a plea of not guilty to that indictment on July 2, 1965, and was found guilty as indicted by a jury on March 21, 1967. Judgment of conviction was rendered on May 19, 1967, and appellant was sentenced to terms of imprisonment of from five to fifteen years on the robbery

count, from three to nine years on each of the assault with a dangerous weapon counts, and from four months to twelve months on the count charging carrying a dangerous weapon, all sentences to be served concurrently with each other but consecutively with the sentence appellant is presently serving in another case.[1/]

On May 31, 1967, the District Court authorized appellant to proceed on appeal without prepayment of costs. Present counsel was appointed by this Court on June 20, 1967. The original record was docketed on July 19, 1967, and the supplemental transcript ordered prepared by this Court was filed on September 21, 1967.

The jurisdiction of this Court on appeal is founded on the Act of June 25, 1948, 62 Stat. 929, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This is an appeal from conviction of robbery, assault with a dangerous weapon, and carrying a dangerous weapon, which crimes were alleged to have been committed by appellant on April 29, 1965, at an A and P grocery store located at 500 12th St., S.E., Washington, D.C.

1/ In Criminal No. 131-65, appellant received a sentence of imprisonment from five to fifteen years. His conviction in that case was recently affirmed by this Court in Samuel B. Lewis, Jr. v. United States, No. 20,133, decided July 5, 1967.

Trial commenced on March 14, 1967. The Government's first witness was Mr. Thomas J. Smith, who had been the manager of the A and P store in Southeast Washington on April 29, 1965. (Tr. 9) Mr. Smith described a robbery commited at his store by three men at about 10:30 a.m. on that date. He identified appellant as one of the participants in that robbery. (Tr. 20) He testified that appellant, together with two other individuals, held him up at gunpoint and obtained over $800 in money belonging to the A and P Corporation. (Tr. 14-25) He also testified that on April 30, 1965, he had identified appellant as one of the three robbers at a police lineup. (Tr. 47)

Following the testimony-in-chief of Mr. Smith, appointed counsel for appellant announced to the Court, out of the presence of the jury, that he had obtained photographs of the April 30 lineup, and requested of the Government the names of the other persons who were placed in the lineup with appellant. (Tr. 50-51) Defense counsel also advised the Court that two cases[2/] were then pending decision by the Supreme Court on the question whether a constitutional right to counsel obtains at a police lineup. (Tr. 51-52)

2/ Wade v. United States, 358 F.2d 557 (5th Cir. 1966); United States ex rel. Stovall v. Denno, 355 F.2d 731 (2d Cir. 1966).

Counsel then said:

> I do think, in light of this pending issue before the Supreme Court, I should ask Your Honor, number one, to allow us to ascertain if, in fact, the defendant was advised of his rights before (sic) counsel before appearing in the lineup, or whether he was made or asked to do anything other than stand in the lineup which might appear to be in an incriminating manner before these witnesses who allegedly identified him. . . . (Tr. 52).

After further remarks of counsel, the following colloquy occurred:

> THE COURT: I don't understand the specific request of counsel to the Court.
>
> MR. ROSEN: I think we should ascertain if, in fact, there was something above and beyond the defendant merely standing in the lineup.
>
> THE COURT: What you are suggesting--it appears to the Court--is that there should have been filed and argued a pretrial motion to suppress any reference to the police lineup.
>
> MR. ROSEN: Your Honor, at this point there has only been testimony by one witness. And I don't think it has been damaging in the sense he has identified someone (sic). But I assume the Government is going to call five or six other witnesses--as many as they need--who will allude to the lineup. In light of these facts, I think the Court can hear it at this time. . . .
>
> THE COURT: Well, this Court will not speculate as to what the Supreme Court of the United States will do with the matters which are before it that have to do with the points raised by counsel. And until such time as the Supreme Court indicates to the contrary, this Court will take no action with respect to denying the Government testimony of witnesses with

> respect to whatever occurred at the police line-up. Your objection to the Court's ruling is noted for the record. (Tr. 54-55)

The prosecutor then turned over to defense counsel certain "Jencks Act" materials, including the names of the other people in the lineup with appellant, and "reports also related to that same lineup which contain the identifications made by the other complaining witnesses, and, that is, witnesses for the Government will (sic) will be called to testify." (Tr. 57)[3/]

Thereafter, the Government produced six witnesses, all previous employees of the Southeast A and P store, who were present in the store at the time of the robbery. Four of these witnesses positively identified appellant as one of the assailants who participated in the robbery. (Tr. 84, 113, 171, 193). Of these four, three testified to having previously identified appellant at the April 30 police lineup. (Tr. 86, 118-19, 193). A fifth witness testified that appellant appeared to be one of the men he observed committing the robbery. (Tr. 147) The sixth witness described some of the events that occurred during the robbery, but was unable to

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3/ The Court might notice that there is a Metropolitan Police Department form known as form P.D. 111, "Statement for Lineup," which contains information regarding the defendant and a brief statement of facts which may include the names of witnesses who have witnessed the lineup and identified the defendant.

make an identification. None of the four witnesses who testified to lineup identifications was cross-examined with respect to these identifications or the circumstances of the lineup. One photograph of the lineup as it was viewed by the witnesses was received in evidence on the prosecutor's motion. (Tr. 194-201) A police detective testified that he was present when the lineup was conducted and the photograph taken. (Tr. 219-21) He was not examined regarding the circumstances or conduct of the lineup.

Appellant's defense was alibi. After establishing through a police officer that appellant, at the time of his arrest on April 30, 1965, did not have on his person any weapons, bullets, or large amount of money, defense counsel called Mr. Joseph R. Jackson, a former employer of appellant, who testified that on April 29, 1965, he had seen appellant at a shoe shop at 9th and Eye Sts.[4/] sometime between the hours of 10:15 and 10:35 a.m. Jackson testified that appellant was then in the company of two men named Garrett and Newman. (Tr. 238, 257)

On cross-examination, the prosecutor asked Jackson if the latter had been convicted of robbery in 1951, which

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4/ It may be inferred that this witness was referring to the location, 9th and Eye Sts., N.W., Washington, D.C. See Tr. 255-56.

conviction the witness admitted. (Tr. 240-41) The prosecutor then asked if Jackson had been convicted of assult with intent to commit robbery in 1956. The witness denied that conviction, but upon further questioning admitted a conviction for possession of a gun, for which he had served sixteen months, and which, he claimed, "was sent back by the Court of Appeals." (Tr. 241-42) Asked whether he had been convicted in 1964 for maintaining a gambling premises, Jackson denied the conviction but conceded he had been convicted of possession of one numbers slip, for which he had received a "90-days suspended sentence." (Tr. 242-44)

Following Jackson's testimony, defense counsel approached the bench and announced that he planned to have appellant testify "at this point." (Tr. 288) He requested exclusion of appellant's criminal record, citing the Brown case,5/ and indicated that appellant had been convicted of assault with intent to commit robbery in 1951 or 1952. Thereafter, the following colloquy occurred:

> MR. ROSEN: . . . However, because of the nature of the offense, it would be so prejudicial to this case that I think--
>
> THE COURT: He doesn't have a criminal conviction, does he?

5/ John I. Brown v. United States, 370 F.2d 242, ____ U.S. App. D.C. ____ (1966).

MR. ROSEN: Yes, Your Honor.

THE COURT: You say he was fifteen years old?

MR. ROSEN: I am sorry, Your Honor. I meant fifteen years ago.

THE COURT: What else?

MR. ROSEN: I believe he indicated one other prior conviction, unlawful possession of an automobile. I am sure the Government has a complete record.

MR. TITUS: I think he is under sentence now, Your Honor, of four to twelve years. I don't know what it is.

MR. ROSEN: That is on appeal.

MR. TITUS: It is on a robbery case.

MR. ROSEN: That is on appeal, Your Honor.

THE COURT: Is that the status of it?

MR. TITUS: I don't know.

MR. ROSEN: I filed the brief. I am the attorney on appeal.

THE COURT: I will hear from the Government.

MR. TITUS: Your Honor, I don't have his record. I would like to get his record and see what it reflects. I have it in my jacket.

THE COURT: Surely.

* * *

MR. TITUS: Did I understand that counsel said there was one robbery conviction?

THE COURT: In 1951, assault with intent to commit robbery.

MR. TITUS: Your Honor, in 1953 the defendant was convicted of 1, 2, 3, 4, 5, 6 robbery convictions, separate cases, plus one assult --I understand--with intent to commit robbery case in 1953.

THE COURT: Do you know about those?

MR. ROSEN: I thought this was '51.

MR. TITUS: He received a total of four to twelve years sentence. Each case was made to run consecutive. I will show it to the Court. This is it here [indicating], sir.

MR. ROSEN: Your Honor, as I understand this, this can be clarified by checking the Court records. He plead guilty to all of these offenses before one Judge and was sentenced. In other words, it became one case and there was one sentence. I thought it was '51.

MR. TITUS: I call that more than one case, Your Honor. There were, at least, seven separate cases. These are individual indictments.

THE COURT: Certainly. You know better, Mr. Rosen.

MR. ROSEN: The information given to me was that he plead guilty to (sic) at one time before one Judge.

THE COURT: That has nothing to do with it, Mr. Rosen. The question is whether these were separate cases. In fact, they were. No, his criminal record is going to be admissible for impeachment purposes. (Tr. 288-91)

Thereafter, counsel advised the Court that appellant had decided not to testify in light of the Court's ruling. (Tr.291)

The next defense witness was appellant's wife, Barbara Lewis, who testified that she had met appellant for lunch at about 12:30 or 12:45 p.m. on April 29, 1965. (Tr. 294)

Appellant then called Mr. James A. Garrett who testified that he met appellant at 10:20 or 10:30 a.m., April 29, 1965, and that the two remained together for sometime thereafter. He also said that a Mr. Joe Newman joined them about fifteen minutes later. (Tr. 335-36) Garrett recalled having seen Joseph Jackson at the location previously testified to by Mr. Jackson.

On cross-examination, the prosecutor elicited ten prior convictions from Mr. Garrett, one for robbery, one for housebreaking, one for attempted housebreaking, two for grand larceny, and five for petit larceny. (Tr. 344-49) Proof of this prior criminal record spanned the years 1939-65.

The next defense witness, Mr. Richard M. Fennell, an employee of Capitol Cadillac Co., testified that on April 29, 1965, Mr. Garrett, the previous witness, together with two other persons, visited the Capitol Cadillac Co. sometime during the morning hours. (Tr. 386-89) This tended to corroborate testimony given previously by James Garrett, who had stated that he, appellant, and Joe Newman had been at Capitol Cadillac Co. on the morning in question. (Tr. 337-40)

The last defense witness was appellant, who testified after the defense had formally rested its case. (Tr. 407) Defense counsel told the Court that defendant had indicated he would like to testify, and was granted permission to re-open the defense case for that purpose. (Tr. 408) Appellant testified in support of his alibi. (Tr. 409-23).

The prosecutor's opening cross-examination proceeded as follows:

CROSS EXAMINATION

BY MR. TITUS:

Q Are you the same Samuel Benjamin Lewis who, on or about June 26, 1953, was convicted of the crime of robbery in six cases and assault with intent to commit robbery in the seventh case?

A I think I am, sir, yes, sir. I was charged with crime in --

Q I didn't ask you that. What do you mean, I think I am? Are you the same Samuel Lewis who was convicted of those offenses?

A Yes, sir.

Q You say, Mr. Lewis, you never had a gun?

A In my life.

Q In your life?

A No sir.

Q All right. . . . (Tr. 423)

Excerpts from the prosecutor's summation follow:

> We heard from a man named Jackson, alias Joe Savoy. What he is we know. . . . (Supp.Tr. 17)
>
> * * *
>
> Now, ladies and gentlemen of the jury, isn't it strange that since the defendant decided to testify in his case he didn't testify first? You see, if you sit here and you listen to the series of the webs that are spun on your behalf, you have a chance to figure out in your mind what the inconsistencies are. So don't take the stand first and tell the jury about the accusations against you. . . . So I will wait, and I will wait until everyone is through; and if there is a gap or a hole missing, I'll fill it in. (Supp.Tr. 18-19)
>
> * * *
>
> You know, you are entitled to draw reasonable inferences from the testimony you have heard in a case. You are not put into some vacuum floating in space and told you must just listen to the words that come from the witnesses and only those words and then not think. God has given you a brain to think.
>
> We know at least three people participated actively in the robbery. We have heard four. And there was a getaway: Mr. Garrett, Mr. Newman, Mr. James [Jackson?]. (Supp. Tr. 21)
>
> * * *
>
> Estimate this. Three men pull a holdup job. They rush out to a car. They get into the car and they drive away. They are men that have to establish an alibi, one for each other. Where do they go? We go over to Capitol Cadillac. . . . (Supp. Tr. 23-24)

Later on during his summation the prosecutor emphasized that criminal records were admitted for consideration "only in-

sofar as they relate to his [the witness'] integrity as a witness. (Supp. Tr. 25-26) The prosecutor also argued that the lineup identifications strengthened the testimony of government witnesses. (Supp. Tr. 27-28, 47, 49) He pointed out that defense counsel had failed to cross-examine government witnesses regarding the circumstances of the line-up. He suggested that, had there been irregularity or unfairness at the lineup, defense counsel would have asked the witnesses about it. (Supp. Tr. 49) He then concluded:

> But he [defense counsel] didn't ask it, because it didn't happen. And you know it didn't happen. (Supp. Tr. 49)

The jury thereafter returned its verdict, finding appellant guilty as charged on all four counts of the indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

D.C. Code § 14-305 (1967): "A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein the proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient."

STATEMENT OF POINTS

I. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO IMPEACH APPELLANT WITH SIX ROBBERY CONVICTIONS AND ONE CONVICTION FOR ASSAULT WITH INTENT TO COMIT ROBBERY

A. THE TRIAL COURT, WHEN CALLED UPON, FAILED ENTIRELY TO EXERCISE DISCRETION WITH RESPECT TO THE IMPEACHMENT OF APPELLANT

B. THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO THE IMPEACHMENT OF APPELLANT

C. THE ERROR OF THE TRIAL COURT WAS EXACERBATED BY IMPROPER REMARKS OF THE PROSECUTOR

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT INQUIRY OUT OF THE PRESENCE OF THE JURY INTO THE CIRCUMSTANCES OF APPELLANT'S LINEUP

SUMMARY OF ARGUMENT

I.

Appellant, testifying as a witness in his own behalf, was impeached with evidence that in 1953, fourteen years previously, he had been convicted of robbery six times and of one assault with intent to commit robbery. The record shows that defense counsel attempted to invoke the "sound judicial discretion" reposed in the trial court to exclude all or part of an accused's criminal record, but that the discretion was never exercised. Alternatively, appellant urges that, in admitting the entire record of prior similar crimes, the trial court abused its discretion. In addition, it appears that this error was compounded, to the prejudice of appellant, by improper remarks of the prosecuting attorney.

II.

The Government's case against appellant consisted solely of eyewitness testimony. Of six eyewitnesses, four testified to having previously identified appellant at a police lineup. Appellant's request for a hearing concerning this lineup was denied. Appellant submits that this was error, because he had a right, upon timely request, to have the circumstances of his lineup scrutinized for due process violations, and to request exclusion of any testimony resulting from unfairness at the police lineup.

ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO IMPEACH APPELLANT WITH SIX ROBBERY CONVICTIONS AND ONE CONVICTION FOR ASSAULT WITH INTENT TO COMMIT ROBBERY.

In 1965, this Court examined the District of Columbia statute[6/] relating to impeachment of witnesses by proof of prior conviction for crime. Judge McGowan, in Luck v. United States, 348 F.2d 763, 121 U.S. App. D.C. 151 (1965), wrote that the statutory language that a prior conviction "may be given in evidence" to affect the witness' credibility means that the trial judge is not required to allow such impeachment, that "the statute. . . leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case." 348 F.2d at 768, 121 U.S. App. D.C. at 156 (Emphasis added). Regarding the impeachment of a defendant in a criminal case:

> There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. [348 F.2d at 768, 121 U.S. App. D.C. at 156.]

6/ D.C. Code § 14-305 (1967), set out at p. 14 supra.

The Court then set forth several factors that might be relevant in such a determination, and reiterated that "the matter is . . . one for the exercise of discretion." 348 F.2d at 769, 121 U.S. App. D.C. at 157.

A. THE TRIAL COURT, WHEN CALLED UPON, FAILED ENTIRELY TO EXERCISE DISCRETION WITH RESPECT TO THE IMPEACHMENT OF APPELLANT.

The minimum requirement of the Luck opinion is that the exercise of some discretion appear in the record when the motion to exclude prior convictions is made. See Gordon v. United States, No. 20,126, Sept. 18, 1967 (Slip op. at 3, 5); Brown v. United States, 370 F.2d 242, _____ U.S. App. D.C. _____ (1966); Stevens v. United States, 370 F.2d 485, _____ U.S. App. D.C. _____, petition for rehearing en banc denied (1966) (dissenting opinion); Jackson v. United States, _____ A.2d _____ (D.C. App., Aug. 10, 1967).

Here no exercise of discretion appears. The record shows that defense counsel attempted to invoke the Court's discretion by requesting exclusion of appellant's criminal record, referring to the Brown case, and suggesting that because of the nature of the charge on trial the effect of impeachment would be prejudicial. (See p. 7 supra) At that point the trial court interrupted counsel with a series of questions which reveal that the court's only concern was whether

in fact appellant had been convicted as an adult. When the prosecutor reported that appellant had seven prior convictions rather than the one that defense counsel had represented,7/ the court abruptly concluded the conference, stating: "The question is whether these were separate cases. In fact they were. No, his criminal record is going to be admissible for impeachment purposes." (Tr. 291)

Appellant recognizes that a meaningful invocation of the trial court's discretion may be required, see Gordon v. United States, No. 20,126, Sept. 18, 1967 (Slip op. at 2); Hood v. United States, 365 F.2d 949, _____ U.S. App. D.C. _____ (1966); Walker v. United States, 363 F.2d 681, 124 U.S.App. D.C. 194 (1966). Here the record reveals that counsel's attempted invocation of the Court's discretion was cut short and frustrated by the court's apparent unwillingness to consider any of the factors that should bear on this important decision. Since "the cold record on appeal cannot present all facets and elements which the trial judge must weigh in striking the balance,"8/ it would be wrong at this point to speculate as to how the balance might have been struck if discretion had been exercised. Appellant was entitled to an informed decision which was never made.

7/ This matter is treated at pp. 21-22, 24 infra.
8/ Gordon v. United States, supra (Slip op. at 3-4).

B. THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO THE IMPEACHMENT OF APPELLANT.

At the time the Luck request was made, the Government had rested its case-in-chief, and appellant had presented one alibi witness. The trial court therefore knew that the Government's case rested solely on eyewitness testimony, the vagaries of which have been given recent attention by the Supreme Court in United States v. Wade, 388 U.S. 218 (1967).9/ Having listened to the opening statement of defense counsel and the testimony of the first defense witness, the Court was aware that a substantial alibi defense would be presented. The court also knew that the seven prior convictions were similar to the one on trial, see Brown v. United States, 370 F.2d 242, _____ U.S. App. D.C. _____ (1966). The court also knew that the seven convictions occurred in 1953, fourteen years in the past. Even more important, perhaps, the court was aware that the seven prior cases were somehow related to each other,10/ although the court demonstrated no interest in

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9/ "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." Id. at 228. See Point II of appellant's brief, pp.27-32 infra.

10/ The records reveal that, on June 26, 1953, appellant pleaded guilty to seven indictments (Crim. Nos. 557-53, 558-53, 559-53, 560-53, 561-53, 562-53, and 563-53)

"checking the court records" as suggested by defense counsel. By merely considering the prosecutor's remark that appellant had been consecutively sentenced in each case, yet the total sentence was but four to twelve years, the court should have suspected that all seven cases were related. Under these circumstances, it seems possible to conclude as a matter of law that probative value to credibility was substantially outweighed by prejudicial impact. Can it be seriously contended that limiting instructions could have prevented the jury from believing that "if he did it before he probably did so this time." Gordon v. United States, No. 20,126, Sept. 18, 1967 (Slip op. at 6)

The trial court's action may be viewed in terms of the guidelines set forth in the recent opinion in Gordon, supra. There Judge Burger emphasized the element of remoteness in time of the convictions, and also considered "the special and even more difficult problem . . . when the prior conviction is for the same or substantially the same conduct for which the accused is on trial." (Slip op. at 6) He recognized that "strong reasons arise" for excluding such

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10/ (contd.) five of which charged robberies all committed on June 9, 1953, and two of which charged assaults with intent to commit robbery committed also on June 9, 1953. In each case the court imposed a sentence of from six to eighteen months, all sentences to be served consecutively.

convictions, and concluded that admission of similar convictions should be allowed only sparingly, "and then only when the circumstances indicate strong reasons for disclosure." (Slip op. at 6) The Gordon case also suggests that prior cases where the defendant pleaded guilty have less relevance to credibility than do cases where the defendant's exculpatory testimony was rejected by a jury.

In summary, there seems a substantial probability that the jury's verdict was influenced by improper considerations. The case was a close one, and this was known to the trial court. The prior crimes evidence was relevant because the crimes involved dishonest intent, but the relevance was minimized by remoteness of fourteen years. The prejudicial impact, which is always a danger when the accused is to be impeached with prior crimes evidence,[11/] was heightened by

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11/ This consideration is reflected in Uniform Rule of Evidence 21, which provides:

> Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility. . . .

This distinction is a recognition of the limited value of limiting instructions. Cf. Shepard v. United States, 290 U.S.96, 104 (1933): "Discrimination so subtle is a feat beyond the compass of ordinary minds. . . ." Jones v. United States, 342 F.2d 863, 119 U.S. App. D.C. 284 (1964).

the similarity of the seven convictions to the charge on trial. Finally, it cannot be confidently asserted that the seven crimes, all having occurred on the same day, were in fact separate, rather than one crime with seven complaining witnesses. Whatever discretion was exercised amounted to a clear abuse which probably affected the outcome of the trial.

C. THE ERROR OF THE TRIAL COURT WAS EXACERBATED BY IMPROPER REMARKS OF THE PROSECUTOR.

Even though the prosecutor told the jury, during his summation, about the limited use of prior convictions, it appears that his tactics invited the jurors to consider the prior crimes on the merits. The first example occurs during the cross-examination of appellant where, immediately following appellant's admission of the prior crimes of robbery and assault with intent to commit robbery, he is asked: "You say, Mr. Lewis, you never had a gun?" (See p. 11 supra) This suggests that since the prior robberies were probably committed with a gun, appellant may have used a gun on April 29, 1965. In other words, the witness is not only a liar but also a "bad man."

Defense counsel planned to call appellant as a witness early in the defense case, and announced his intention to the court at the time of the Luck request. Following the

court's unfavorable ruling, counsel advised the court that appellant had decided not to testify. (See p. 9 supra) Defense counsel then called the remainder of his witnesses and rested his case. Thereafter, counsel indicated that appellant had decided he wanted to testify, and his testimony was elicited at that point.

From these events, it should have been clear that appellant had planned to testify earlier, had changed his mind because of the Luck ruling, and for some reason changed his mind again at the end of the case. In this context, the prosecutor's argument about appellant's motives in waiting to testify seems improper. (See p. 12 supra) In any event, this damaging argument was made possible by factors that grew directly out of the court's ruling.

Finally, the prosecutor was permitted to impeach the two key defense alibi witnesses with numerous prior convictions.[12/] (See pp.6-7,10 supra) This fact heightened

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12/ The cross-examination of appellant's two alibi witnesses, Jackson and Garrett (Tr. 240-44, 344-49), contains instances where both witnesses denied having been convicted of prior crimes, but the prosecutor never completed impeachment in these instances with proof by certified copies of judgments of conviction. see D.C. Code § 14-305 (1967). This suggests that the prosecutor had not obtained these official records but rather relied upon a police form that may not have been accurate. It would seem that knowledge of the official records of conviction would be the minimum "good faith

the prejudice to appellant who then became not only a "bad man" but a cohort of bad men. The prosecutor was not unaware of this possibility. He told the jury it could infer that appellant, together with these two, committed the robbery and then fabricated an alibi. (See p. 12 supra) Is it not clear that the force of that argument was derived from the evidence of prior convictions?

12/ (contd.) basis" for prior crimes impeachment, if not required by considerations of fairness and courtesy.

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT INQUIRY OUT OF THE PRESENCE OF THE JURY INTO THE CIRCUMSTANCES OF APPELLANT'S LINEUP.

After the first prosecution witness had testified to having identified appellant at a police lineup, defense counsel requested a hearing by the court to "ascertain if, in fact, there was something above and beyond the defendant merely standing in the lineup." (See p. 4 supra) Counsel also explained that the issue of right to counsel at a lineup was pending before the Supreme Court, and cited the two cases[13/] in which certiorari had been granted. In one of the cases cited by counsel[14/] the Fifth Circuit Court of Appeals had held that the conduct of a lineup in the absence of counsel, specifically, that the accused had been observed in the custody of the police by the identification witnesses before the lineup, was violative of the accused's sixth amendment rights.[15/]

The court suggested that the point thus raised should have been the subject of a pretrial motion to suppress, and summarily denied the motion. The record is silent regarding

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13/ Wade v. United States, 358 F.2d 557 (5th Cir. 1966); United States ex rel. Stovall v. Denno, 355 F.2d 731 (2d Cir. 1966).

14/ Wade v. United States, supra.

15/ The Fifth Circuit Court of Appeals had therefore reversed with instructions that, in the event of a new trial, the testimony of the eyewitness would be excluded. 358 F.2d at 560.

the conduct of appellant's lineup. Neither counsel explored the matter, although four Government witnesses testified that they had identified appellant at the lineup which had been held on the day following the crime.

The Supreme Court has since recognized a right to counsel at a police lineup, United States v. Wade, 388 U.S. 218 (1967), but has also held that the principle is not applicable to cases, such as appellant's, involving lineups conducted prior to June 12, 1967, Stovall v. Denno, 388 U.S. 293 (1967). Although refusing to accord retroactive application to the Wade principle, the Court was careful to point out that "it remains open to all persons to allege and prove, as Stovall attempts to do in this case, [16/] that the confrontation resulted in such unfairness that it infringed his right to due process of law." Id. at 299. The Court then examined Stovall's due process contention:

> We turn now to the question whether petitioner, although not entitled to the application of Wade and Gilbert to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. [Id. at 301-02]

16/ Note that the Stovall case was a collateral attack on a state conviction.

The Court indicated disapproval of "the practice of showing suspects singly to persons for the purpose of identification," id. at 302, but concluded that a one-to-one hospital confrontation had been "imperative" under the special circumstances presented. Accordingly, it affirmed. A similar result was reached by this Court in Wise v. United States, No. 20,259, July 27, 1967, where Judge Leventhal recognized the Stovall requirement apart from any right-to-counsel claim, and suggested that "the presentation of only one suspect, in the custody of the police, raises problems of suggestibility that bring us to the threshhold of an issue of fairness." Wise v. United States, supra, (Slip op. at 6). Special circumstances were presented, however, and the accused's fundamental rights had not been abridged.

It therefore cannot be doubted that appellant had the right to have the circumstances of his lineup scrutinized for unfairness. He requested a hearing out of the presence of the jury, and advised the court that the claim he sought to establish was then being considered by the Supreme Court. The denial of his request was error.

Should the accused have been required to probe for unfairness in the presence of the jury? This option was certainly open to him, as was brought home by the prosecutor

in his summation. (See p. 13 supra) Counsel was confronted with a delicate tactical problem. He probably was unaware of the circumstances surrounding the confrontation.[17/] Cross-examination on this point "in the dark" would have been potentially suicidal, particularly in a close case where the Government relied entirely on eyewitness identification testimony. It is for this reason that the voir dire hearing in this context is crucial. Cf. Gregory v. United States, 369 F.2d 185, 191, _____ U.S. App. D.C. _____ (1966). Furthermore, it seems axiomatic that a defendant, improperly denied the opportunity to establish a violation of his constitutional rights in an exclusionary hearing, is not required to develop

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17/ It cannot be reasonably inferred that counsel knew the circumstances. "Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers." United States v. Wade, 388 U.S. 218, 230-31 (1967). Counsel was not furnished the names of the other participants until the trial was well underway, and it seems a fair assumption that the "reports" turned over to the defense (see p. 5 supra) would not have contained any of the circumstances which might reveal unfairness, e.g., the fact that the witnesses mi ht have observed appellant prior to the lineup alone and in the custody of police officers, as in the Wade case, 388 U.S. at 234. To suggest that counsel's failure to cross-examine on this point was the result of knowledge that no unfairness had occurred would be sheer speculation.

the issue at his peril in the jury's presence,[18] particularly where, as here, the court had made it clear that it would "take no action with respect to denying the Government testimony of witnesses with respect to whatever occurred at the police lineup." (See pp. 4-5 supra)

Stovall and Wise teach that a defendant has the right to challenge the fairness of the lineup at which he was identified.[19] The result of a showing of due process violation would be exclusion of testimony about the lineup plus exclusion of any in-court identifications that are tainted by the prior procedure. Cf. United States v. Wade, supra. Appellant was denied this right even though a timely request

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18/ See United States v. Wade, 388 U.S. 218, 240-41 (1967):

> Counsel is then in the predicament in which Wade's counsel found himself--realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification.

See also Gilbert v. California, 388 U.S. 263 (1967). In both cases, the Court remanded for further inquiry into the lineup issue.

19/ Although Wade standards are not directly applicable to the due process determination, they may have relevance on the basic issue of fairness, cf. Clewis v. Texas, 386 U.S. 707, 711 (1967).

was made. He should now be entitled to a hearing to permit full development of the facts essential to this determination.

CONCLUSION

For the reasons set forth in these arguments, the judgment below should be reversed.

If we are correct in our contention on Point I, this Court should remand the case to the trial court for a new trial with directions to exclude appellant's criminal record from evidence, or to exercise discretion with respect to that record in accordance with decisions of this Court.

If we are correct in our contention on Point II, this Court should remand the case to the trial court with directions to hold a hearing at which appellant may seek to establish his claim that the trial testimony of certain government witnesses should be excluded as the fruit of a pretrial lineup procedure which was violative of appellant's due process rights.

Respectfully submitted,

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Counsel for the Appellant
(Appointed by this Court)

Washington, D.C.
October 16, 1967

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of October, 1967, I did personally serve a copy of the above Brief for Appellant upon the Office of the United States Attorney for the District of Columbia, United States Court House Washington, D.C.

Addison M. Bowman
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21083

SAMUEL B. LEWIS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
HAROLD H. TITUS, Jr.,
Assistant United States Attorneys.
JOEL M. FINKELSTEIN,
Special Attorney
to the United States Attorney.

Cr. No. 723–65.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

I. Whether the trial court erred in permitting the Government to impeach appellant by disclosing his prior criminal record where (1) defense counsel did not inform the court of the details of appellant's defense, the availability of other witnesses to present it, the specifics of appellant's proposed testimony, or the need to have appellant testify, but simply asked the court for a *Luck* ruling and argued that disclosure of appellant's prior convictions would be prejudicial, and (2) appellant's testimony absent impeachment by prior convictions would have attached undue weight to appellant's defense for, when appellant chose to testify, the case was simply a battle of credibility, appellant's defense having been already submitted to the jury through the testimony of two other witnesses whose credibility was severely impeached.

II. Whether the evidence was such that the prosecutor could by innuendo suggest that appellant's alibi witnesses might have been appellant's co-participants in the A & P hold-up; and, if not, whether the prosecutor's suggestion is cause for reversal under the circumstances of this case.

III. Whether the trial court was obligated to hold a hearing to explore the circumstances surrounding appellant's pre-*Wade* line-up where appellant did not allege any facts to indicate that the line-up in which he stood when identified was so unfair that it denied him due process.

IV. Whether appellant is entitled to a remand with directions to hold a hearing to explore the circumstances surrounding his line-up identification where (1) there was nothing brought out at trial to suggest that the line-up procedures were unfair, and (2) testimony is such that the possibility that the Government's identification testimony was a product of or exaggerated by improper influences is nil.

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a four count indictment with robbery (22 D.C. Code § 2901), two counts of assault with a dangerous weapon (22 D.C. Code § 502) and carrying a dangerous weapon (22 D.C. Code § 3204). On July 2, 1965 he pleaded not guilty to each of the four counts. Appellant was tried before a jury and on March 21, 1967 was found guilty on all counts. On May 19, 1967, he was sentenced to five to fifteen years on the robbery count, three to nine years on each of the assault with a dangerous weapon counts and four to twelve months on the carrying a dangerous weapon count. All the sentences were imposed concurrently with each other but consecutively with the sentence appellant is presently serving in another case.[1]

[1] In Criminal No. 131–65, appellant was sentenced to a term of five to fifteen years. Appellant's conviction in this case was recently affirmed by this Court in *Lewis v. United States*, No. 20133, decided July 5, 1967.

On appeal appellant argues (1) that the trial court improperly permitted the Government to impeach him by evidence of prior convictions and (2) that the trial court erroneously refused to conduct a hearing out of the presence of the jury to explore the circumstances surrounding line-up identifications subsequently admitted in evidence. In view of the issues raised by appellant, we think it is necessary to set out in some detail the testimony of most of the witnesses.

a. The Government's case

The trial commenced on March 14, 1967, before a jury and the Honorable Aubrey E. Robinson. Before the Government called its first witness, the prosecutor turned over to defense counsel photographs taken of a line-up in which appellant stood when identified by the manager and several other employees of the A & P as one of the participants in the hold-up of April 29, 1965 (Tr. 5).

The Government began presentation of its case by calling Thomas J. Smith who on the date of the offense was the manager of the A & P located at 500 12th Street, Southeast, in the District of Columbia (Tr. 8–9).

Smith testified that on April 29, 1965, at approximately 10:25 a.m. he was in his office located just inside the front door of the store (Tr. 9).[2] He described his office as containing a cash drawer till, records and a safe (Tr. 9). He said the walls are constructed of plywood four feet from the floor with a foot of glass above the plywood enabling anyone inside to look out into the store (Tr. 10). There is an opening in the glass which Smith called the check-cashing window (Tr. 10).

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[2] A diagram of the floor plan of the A & P appears at page 64 of the record. The front of the A & P runs along 12th Street, the back along 13th Street; the left is bordered by E Street and the right by Pennsylvania Avenue. The front door is on 12th Street at the corner of E; the office is immediately to the right of the front door. There is a frozen food case running along the wall of the 12th Street side of the store from the office toward the Pennsylvania Avenue side. The produce department is located along the Pennsylvania Avenue side, the meat department along the 13th Street side toward the Pennsylvania Avenue side, the dairy department next to the meat department but closer to the E Street side. The cash registers are between the dairy department and the office.

He stated that at approximately 10:30 a.m. "a nice looking Negro gentleman approached the front of the office, asked him something, then pointed a pistol through the check-cashing window and said, 'This is a hold-up'." (Tr. 14–15). He described this man as very well dressed, wearing a dark suit, white shirt, tie, dark hat, and tinted sunglasses (Tr. 14). At the same time this "gentleman" (robber No. 1) held a gun on Smith, another man (robber No. 2) knocked on the door leading to the office and pointed a gun over the glass at Smith's head (Tr. 15). When Smith refused to open the door to the office as asked, robber No. 2 broke the glass with his pistol (Tr. 15–16). And when Smith offered them the money in the check-cashing drawer, a third man (robber No. 3) jumped from a frozen food case located outside the front of the office over the glass into the office (Tr. 16). Robber No. 3 struck Smith with a pistol and ordered him to open the safe (Tr. 16). After Smith replied that he was welcome to what was in the bottom of the safe[3] and the cash drawer, robber No. 3 took what money he found in the safe and passed it to robber No. 2 standing outside the office door who dumped the loot into a bag (Tr. 16-17).

Smith testified that while he was confronted by robbers Nos. 2 and 3, he was unaware of the activities of robber No. 1 (Tr. 17). He related that sometime during the hold-up he saw one of A & P's employees, a porter named Robert Starks, running up one of the aisles of the store toward the office. Before Starks reached the office, Smith yelled for him to stop. Robber No. 1 then turned, pointed his pistol at Starks, and ordered Starks to stop (Tr. 18). Smith testified he also noticed that one of the cashiers, Norris Barnes, and the produce manager, John Luchie, observed the hold-up (Tr. 21). He said Mrs. Barnes, upon observing the hold-up, ran toward the meat department. Luchie, he said, ran toward the back of the store. Smith related that a few minutes later Luchie together with William Stowell, and another A & P employee,[4] came to the front of the store with their hands in the air (Tr. 21). Smith was unable to see who held

[3] Smith said he could not open the top of the safe (Tr. 16).

[4] Subsequent testimony revealed that this was a reference to Charles Burton.

a gun on them (Tr. 22). A few moments after Luchie, Stowell, and Burton reached the front of the store, one of the hold-up men yelled, "Let's go." [5] and robber No. 3 hurdled the office door and together with the other two left the premises (Tr. 22). Smith estimated that the robbery took approximately three to five minutes and that the hold-up men took a little more than $800 (Tr. 23–25).

Smith identified appellant as robber No. 1 (Tr. 19–20) and said that he was able to pick appellant out of a line-up of four men held on the day following the robbery (Tr. 18, 47). In making his courtroom identification, Mr. Smith noted that appellant had shaved off his mustache he wore on the date of robbery (Tr. 19). He testified that during the course of the robbery he stood as close as two feet to appellant and looked directly at appellant's face (Tr. 39, 65). He observed that the lighting conditions of the store at the time were excellent (Tr. 39). On cross, he testified that he looked at appellant's face for approximately 30 seconds or a minute and that he was positive that it was appellant who held a gun on him through the check-cashing window (Tr. 69, 70).[6]

Before defense counsel undertook to cross-examine Smith, he asked the prosecutor out of the presence of the jury if he would submit to him the names of the individuals who stood in the line-up with appellant (Tr. 50). The prosecutor initially refused but a few moments later complied with defense counsel's request turning over, in addition to the names of the individuals who stood in the line-up, the line-up reports containing the names of the witnesses who identified appellant (Tr. 50, 57). During the colloquey, defense counsel informed the court that *United States* v. *Wade*, 388 U.S. 218 (1967) and *Stovall* v. *Denno*, 388 U.S. 293 (1967) were pending in the Supreme Court and the following exchange took place (Tr. 53–55):

> Mr. ROSEN [defense counsel]. Your Honor, in the Stovall Case and in the Wade Case there was conduct which was questioned above and beyond the straight

[5] Subsequent testimony revealed that appellant yelled, "Let's go." (Tr. 97).

[6] On cross, he stated that he saw appellant several times in the witness room in the courthouse prior to trial and recognized him then as one of the hold-up men (Tr. 71).

lineup where a person is required by police authorities to stand straight in front of a witness or witnesses who are a certain distance away from the accused to make a determination as to whether this, in fact, is the man or not. Both of these cases involve unusual identification procedures without the right to counsel. Representations have been made to me by the defendant on certain things which transpired at the lineup. For example, he was required to wear his hat in a certain manner, to turn in a certain manner and walk in a certain manner to either assist the witnesses in identifying him or appear in a manner that might because the witnesses had indicated to the police that is how the person who committed the alleged crime appeared to them.

Now, it would appear to me, in light of the fact that this is before the Supreme Court at this time—we don't know what ruling they are going to make—that there might be an issue as to whether, in fact, the defendant does have a right to have counsel present at the lineup stage, and whether he must be advised he is not required to do something above and beyond.

The COURT. I don't understand the specific request of counsel to the Court.

Mr. ROSEN. I think we should ascertain if, in fact, there was something above and beyond the defendant merely standing in the lineup.

The COURT. What you are suggesting—it appears to the Court—is that there should have been filed and argued a pretrial motion to suppress any reference to the police lineup.

Mr. ROSEN. Your Honor, at this point there has only been testimony by one witness. And I don't think it has been damaging in the sense he has identified someone. But I assume the Government is going to call five or six other witnesses—as many as they need—who will allude to the lineup. In light of these facts, I think the Court can hear it at this time. I will leave that determination to the Court.

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> The COURT. Well, this Court will not speculate as to what the Supreme Court of the United States will do with the matters which are before it that have to do with the points raised by counsel. And until such time as the Supreme Court indicates to the contrary, this Court will take no action with respect to denying the Government testimony of witnesses with respect to whatever occurred at the police lineup. Your objection to the Court's Ruling is noted for the record.

After the court denied defense counsel's request for a hearing to explore the circumstance of the line-up identifications, the prosecutor turned over to defense counsel all "Jencks Act statements."

Defense counsel then proceeded to cross-examine Smith who repeated much of his direct testimony and stated that he was sure appellant was one of the hold-up men (Tr. 70). Cross-examination concluded without defense counsel making an attempt to explore the circumstances of Smith's line-up identification.

William Stowell, manager of the meat department, testified that on April 29, 1965 at approximately 10:25 a.m. he was working in the meat department [7] when Norris Barnes came into the cutting room and told him of the hold-up taking place in the front of the store (Tr. 74–76). Upon learning of the hold-up, Stowell ran in the direction of the dairy department where he could observe what was taking place at the office (Tr. 77–79). Looking toward the office, he saw three men in the position described by Smith; one in the office, one holding a gun over the top of the office, and another at the check cashing window (Tr. 80). Realizing the store was being held-up, Stowell ran back to the meat department where he told the employees that the store was being held-up. He then ran into a back room where a pay phone was located. (Tr. 80–81.) He said it took him several minutes to find a coin and that, before completing his call to the Police Department, a man came into the back room and told him to put the phone down (Tr. 81). Stowell

[7] The meat department is located along the 13th Street side of the store toward Pennsylvania Avenue (Tr. 64).

dropped the phone, put his hands into the air and walked toward the front of the store (Tr. 83). Another butcher, Charles Burton, was in the back room. Burton, too, was ushered out of the back room with his hands in the air (Tr. 84).

Stowell identified appellant as the man, who told him not to complete the phone call, describing him as very neatly dressed, wearing a dark suit and tie, a hat, and bluish tinted sunglasses (Tr. 84–86). He said he observed appellant for approximately four minutes during the course of the hold-up (Tr. 88) and testified that he identified appellant the next day picking him out of a line-up which included four men (Tr. 86). He noted that appellant no longer wore the mustache he had at the time of the offense (Tr. 86).

On cross-examination, Stowell testified that when he left the back room with appellant he passed within three feet of him and stared directly at his face (Tr. 94). He said appellant yelled "Let's go" upon reaching the front of the store, and the three men left the premises in the manner described by Smith (Tr. 97). Defense counsel completed cross-examination when Stowell reiterated that he was absolutely certain that appellant was one of the hold-up men (Tr. 99). As was the case with Smith, defense counsel made no attempt to explore the circumstances of Stowell's line-up identification.

John Lee Starks, Jr., another A&P employee, testified that on the day of the offense he was setting up oranges in the produce department when a lady directed his attention to the hold-up taking place in the office (Tr. 103–107). He related that, upon seeing a man holding a gun on Mr. Smith, he (Starks) ran toward the office holding a bottle in his hand. As he got within five feet of one of the hold-up men, identified as appellant, Smith yelled for him to stop. (Tr. 108–110.) Appellant turned pointing a gun in Stark's direction, told Starks to "whoa", and Starks stopped (Tr. 110–112). Starks testified that appellant then left the front of the store (Tr. 111).

Starks positively identified appellant as the man who held a gun on him, describing him as well dressed, wearing a suit and tie and hat.[8] He said he stood four feet from appellant and

[8] Starks said, however, that he did not think appellant was wearing dark glasses (Tr. 119, 131).

> The COURT. Well, this Court will not speculate as to what the Supreme Court of the United States will do with the matters which are before it that have to do with the points raised by counsel. And until such time as the Supreme Court indicates to the contrary, this Court will take no action with respect to denying the Government testimony of witnesses with respect to whatever occurred at the police lineup. Your objection to the Court's Ruling is noted for the record.

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[8] Starks said, however, that he did not think appellant was wearing dark glasses (Tr. 119, 131).

observed him closely for approximately 45 seconds. (Tr. 112–113, 132.) He, too, noted that appellant had shaved off his mustache since the date of the offense and testified that he was able to identify appellant the next day as appellant stood in a four man line-up (Tr. 117–119).

On cross-examination, Starks repeated much of what he said on direct and again positively identified appellant (Tr. 126, 130). Again defense counsel did not explore the circumstances of the line-up identification.

John Luchie, another A & P employee, followed Starks. He testified that on the morning of the offense he was in the produce department when he observed Starks running up an aisle going from the produce department toward the office. He followed Starks up the aisle a short way and, seeing the hold-up taking place at the office, turned and went toward the back room. (Tr. 137–139.) When he got to the door of the back room, a man, whom he identified as appellant, was standing there ushering Stowell and Burton out (Tr. 141). Appellant told Luchie to turn around, put his hands up and march to the front of the store (Tr. 141). Together with Stowell and Burton, Luchie did as appellant ordered (Tr. 141). Luchie stated that they stopped around the checkout stand, which was near the office and front entrance, and that, when appellant yelled "come on", the hold-up men left in the manner described by Smith (Tr. 143–145).

He testified that at the back door he was within six feet of the man who ordered him to the front of the store and identified appellant as appearing to be this man (Tr. 142, 147). He described appellant as well dressed, wearing a dark suit, tie, hat, and sunglasses (Tr. 146). Like the other witnesses, he noticed that appellant had shaved off his mustache since the date of the offense (Tr. 146).

On cross-examination, Luchie repeated much of his direct testimony and again stated appellant looked like one of the hold-up men (Tr. 160).

Elaine Cissel testified next. Mrs. Cissel, a meat wrapper for A & P, related that on the day of the offense she was in the meat department standing behind sliding glass windows

through which she could see the store but could not be seen by persons in the store (Tr. 166–167). At about 10:30 a.m. she saw a man carrying a gun, walk past the front of the meat counter going toward the back of the store (Tr. 168). She observed him usher Stowell and Burton out of the back room and direct them toward the front of the store (Tr. 169). She testified that she saw the hold-up man's face "for a couple of seconds" as he walked past the meat counter going toward the back of the store and again returning to the front of the store (Tr. 172). She identified the man as appellant describing him as dressed in a dark suit and wearing sunglasses (Tr. 170–171). She, too, noticed that appellant had shaved off his mustache since the date of the offense (Tr. 173).

On cross-examination Mrs. Cissel again identified appellant as one of the hold-up men (Tr. 178).

Charles Burton, another A & P employee, followed Mrs. Cissel. Burton was in the meat cutting room, when Norris Barnes ran toward the back of the store to inform Stowell that the store was being held-up (Tr. 181–182). Seeing Stowell run from the meat department into the store and then back to the meat department and into the back room toward the telephone, Burton followed (Tr. 182–183). Burton testified that while Stowell was dialing the police, he (Burton) looked through the window of the door leading from the back room into the store and saw a man with a gun in his hand coming toward him (Tr. 183–184). He stated that the hold-up man ordered Stowell to put the phone down and to come out of the back room. Burton followed Stowell out (Tr. 184). Burton testified that, in addition to observing the hold-up man's face as he approached the back door, he saw his face on two separate occasions while walking toward the front of the store turning around twice when the hold-up man shouted at him (Tr. 185–187). Burton described the trio's exit in much the same way as it had been described by other witnesses (Tr. 189–190).

Burton identified appellant as the man who ordered him and Stowell to the front of the store, describing him as nicely dressed, wearing a suit, tie, hat and sunglasses (Tr. 192–193). He said he next saw appellant when he identified him in a

line-up held the following morning (Tr. 193). He, too, noticed that appellant had shaved off his mustache since the date of the offense (Tr. 194).

At this point in the trial, the prosecutor had two photographs marked as exhibits, the photographs depicting line-ups (Tr. 194–195). The photograph marked Government exhibit 2 (which was later renumbered "1") was identified by Burton as depicting the line-up in which appellant stood when he identified him (Tr. 198). He said that the men standing in the line-up were wearing hats when he made his identification (Tr. 198).

Defense counsel briefly cross-examined Burton again choosing not to explore the circumstances of the line-up identification.

After calling Norris Barnes, whose testimony was brief, the Government concluded its case by calling Detective Sergeant Raymond McMullen. Sergeant McMullen, who conducted the line-up in which appellant stood the morning after the robbery, identified Government exhibit 2 as a photograph of that line-up (Tr. 220–221). Sergeant McMullen brought out that the hat worn by appellant when he stood in the line-up belonged to appellant (Tr. 222).

The prosecutor then introduced a certificate in which it was certified by appropriate members of the Metropolitan Police Department that on April 29, 1965 appellant did not possess a permit or license to carry a pistol in the District of Columbia (Tr. 226).[2] This concluded the Government's case.

b. Appellant's case

Appellant opened his case by calling Sergeant McMullen. Sergeant McMullen testified that he arrested appellant at appellant's home and searched his person but not the premises. He said his search disclosed no weapons and normal amount of money that an individual would carry, "possibly $10.00, $20.00, $30.00 or whatever it was" (Tr. 233). Sergeant McMullen stated that the clothes appellant wore when standing in the line-up at which he was identified were the clothes he was wearing when arrested (Tr. 234).

[2] Defense counsel stipulated that the certificate would be the testimony of the officers whose names appeared on the certificate (Tr. 226).

Following Sergeant McMullen, appellant called Joseph Jackson, a contractor and nightclub operator who at the time of the offense employed appellant as a painter (Tr. 236–237). Jackson testified that on Thursday, April 29, 1965, he saw appellant, who had taken the day off, some time between 10:15 a.m. and 10:35 a.m. at a shoe shop located at 9th and Eye.[10] He said he also saw James Garrett and Joe Newman at the shoe shop and remembered that appellant had on a white cap that morning (Tr. 238–239). He testified that he never saw appellant wear sunglasses (Tr. 239).

On cross-examination, Jackson admitted that he was convicted of robbery in 1951; denied that he was convicted of assault with intent to commit robbery in 1956 stating that on this occasion he was convicted of possession of a gun; denied that he was convicted of maintaining a gambling premises in 1964 but admitted he was convicted of possession of lottery slips (Tr. 240–244).

Jackson said he first learned of appellant's arrest on the evening of April 30, 1965, when he called and spoke to appellant's wife. According to his testimony at this point in the trial, he did not learn of the reason for appellant's arrest until the middle of May when appellant himself informed him (Tr. 246).[11] He stated that appellant, while in his employ, earned about $70 a week (Tr. 263–264). Jackson repeated that he saw appellant at a shoe shop at 9th and Eye on the morning the robbery occurred and that appellant, Garrett and Newman were at the shop when he drove off at 10:40 a.m. (Tr. 275–276).

Following the prosecutor's cross-examination of Jackson, defense counsel informed the court that he planned to call appellant and requested a *Luck* ruling. Out of the presence of the jury, the prosecutor and defense counsel discussed the matter with the court (Tr. 288–291):

> Mr. Rosen [defense counsel]. Your Honor, at this point I plan on calling the defendant in his own behalf. However, I would like to make a proffer similar to the

[10] It seems clear that this address refers to 9th and Eye Streets, Northwest.

[11] Later, on cross, Jackson said he did not know when he learned of the reason for appellant's arrest and could not recall whether he learned of the robbery charge from appellant or his (Jackson's) forman (Tr. 270–272).

Brown case and ask to exclude the prior criminal record of the defendant. He has a prior conviction for assault with intent to rob. It goes back to 1951 or '52, approximately in that period of time, when he was about fifteen years old. However, because of the nature of the offense, it would be so prejudicial to this case that I think—

The COURT. He doesn't have a criminal conviction, does he?

* * * * *

Mr. ROSEN. I am sorry, Your Honor. I meant fifteen years ago.

The COURT. What else.

Mr. ROSEN. I believe he indicated one other prior conviction, unlawful possession of an automobile. I am sure the Government has a complete record.

Mr. TITUS. I think he is under sentence now, Your Honor, of four to twelve years. I don't know what it is.

Mr. ROSEN. That is on appeal.

Mr. TITUS. It is on a robbery case.

Mr. ROSEN. That is on appeal, Your Honor.

The COURT. Is that the status of it?

Mr. TITUS. I don't know.

Mr. ROSEN. I filed the brief. I am the attorney on appeal.

* * * * *

Mr. TITUS. Your Honor, in 1953 the defendant was convicted of 1, 2, 3, 4, 5, 6 robbery convictions, separate cases, plus one assault—I understand—with intent to commit robbery case in 1953.

The COURT. Do you know about those?

Mr. ROSEN. I thought this was '51.

Mr. TITUS. He received a total of four to twelve years sentence. Each case was made to run consecutive. I will show it to the Court. This is it here [indicating], six.

Mr. ROSEN. Your Honor, as I understand this, this can be clarified by checking the Court records. He plead guilty to all of these offenses before one Judge and was sentenced. In other words, it became one case and there was one sentence. I thought it was '51.

Mr. TITUS. I call that more than one case, Your Honor. There was, at least, seven separate cases. These are individual indictments.

The COURT. Certainly. You know better, Mr. Rosen.

Mr. ROSEN. The information given to me was that he plead guilty to at [sic] one time before one Judge.

The COURT. That has nothing to do with it, Mr. Rosen. The question is whether these were separate cases. In fact, they were. No, his criminal record is going to be admissible for impeachment purposes.

Defense counsel, a few moments later, advised the court that appellant had decided not to testify (Tr. 291). Appellant then called his wife, Barbara Lewis. After touching upon the circumstances surrounding appellant's arrest, Mrs. Lewis testified that on the day of the robbery she met appellant at approximately 12:30 p.m. for lunch. She said that appellant met her at the office where she worked [12] and that they had lunch together at a place nearby (Tr. 294).

On cross-examination, Mrs. Lewis related that appellant was well dressed when he met her for lunch; that he wore a brown suit and hat. She could not recall if appellant wore a tie or if his shirt was brown or tan (Tr. 301–302). She later testified that she, appellant and their son went out to dinner that evening and that appellant had at that time changed into a black suit and tie (Tr. 309). She said he wore a hat that evening and added that he always wore a hat, and usually dressed in suit and tie (Tr. 310).

On redirect, Mrs. Lewis testified that appellant never wore glasses and that sometime since April, 1965 he had shaved off his mustache (Tr. 318). She further testified that appellant wore a white cap when he was working or when "he wasn't dressed to go someplace" (Tr. 325).

Appellant called James Garrett next. Garrett stated that he and appellant were good friends and that to his knowledge appellant never wore sunglasses. He said he met appellant on

[12] Mrs. Lewis worked for the Office of Economic Opportunity in the capacity of secretary (Tr. 292). The office where she worked was located in the Municipal Center (Tr. 417).

the day of the offense at James' Shoe Clinic on 9th and Eye some time between 10:20 and 10:30 a.m. and that appellant was wearing a white cap and green pants at the time. (Tr. 335–336.) He and appellant, so he testified, remained at the shoe shop for about 15 or 20 minutes until Joe Newman arrived. According to Garrett, when Newman asked him for a ride to Capitol Cadillac, located on 22nd Street, Northwest, stating that he was interested in a deal on a Thunderbird, Garrett complied taking appellant with him. (Tr. 336–337.) Garrett said they arrived at Capitol Cadillac at about 11:15 a.m., and that he and appellant browsed around the used car lot (Tr. 338–339). In the meantime, Newman, he said, was speaking to a salesman about a Thunderbird (Tr. 339). Garrett related that, while he was browsing in the used car lot with appellant, a salesman spoke to him and gave him his card (Tr. 338–339). According to Garrett, they left Capitol Cadillac approximately 40 minutes after they arrived at which time he took appellant to his automobile which appellant had parked on 8th and L, Northwest (Tr. 340). At this point in the trial, Richard Fennell, a salesman employed by Capitol Cadillac, was brought into the courtroom for a moment and Garrett identified him as the car salesman to whom he spoke (Tr. 341–342). Garrett concluded his direct testimony stating that he noticed appellant had shaved off his mustache since April, 1965 (Tr. 342).

On cross-examination, Garrett acknowledged that he might have been convicted of petty larceny in 1939, denied that he had been convicted of assault in 1944, admitted that he had been convicted of petty larceny on four separate occasions in March 1945,[13] admitted that he had been convicted of housebreaking and grand larceny in 1945, of robbery in 1954, and attempted housebreaking in 1965 (Tr. 344–349). He testified that he was at James' Shoe Clinic, having placed a pair of shoes there, and that he had asked appellant to meet him there to discuss the purchase of a set of spark plugs for his automobile (Tr. 30–352). He said that he wanted appellant's advice because appellant was a mechanic (Tr. 352).

[13] As to three more petty larceny convictions at about that time, he was not sure (Tr. 346–347).

Garrett acknowledged that although he had seen appellant about twice a week for a period of seven or eight years, April 29, 1965, was the first day he saw appellant wear a white cap (Tr. 353). He remembered that appellant was wearing green pants and a beige sweater that day (Tr. 378).

Appellant then called Richard Fennell, who in April 1965. was employed as a salesman at Capital Cadillac (Tr. 384–385). He testified that he spoke with a man he believed to be Garrett at Capitol Cadillac but could not pinpoint the date (Tr. 386). He said that there were two other men with the man he believed to be Garrett but could not recall if appellant was one of them (Tr. 387–388, 391). He believed that the men stayed at Capitol Cadillac for about 12 minutes and left some time before 12:30 p.m. (Tr. 389, 396).

After Sergeant McMullen, who was recalled, briefly testified, appellant took the stand. He accounted for his actions on April 29, 1965, testifying that he saw his son off to school at about 8:30 a.m., left the house and spoke to a few neighbors at around 8:45 a.m., then drove to his uncle's place, a poultry shop, at around 10:00 a.m., and from his uncle's place went to 9th and Eye, Northwest (Tr. 410). He said he was wearing a white cap, beige sweater and olive colored pants that day (Tr. 410–411).

Appellant testified that he parked his car at 8th and L and went to James' Shoe Clinic to meet James Garrett who had called him earlier that week and said he wanted to discuss something with him. According to appellant, it was not until he met Garrett at the shoe shop that he learned Garrett wanted him to do some work on his (Garrett's) automobile (Tr. 412). He said he met Garrett at the shop at 10:15; that several other people were in the shop at that time; a fellow called Fat Man. a "shoe shine boy", one of the James' brothers who ran the shop, and a fellow named Davis who ran an upholstery shop next door (Tr. 413). Joe Newman, he said, arrived a short time later. He testified that, as he, Garrett, and Newman were standing around the shop, Joe Jackson arrived (Tr. 413).

Continuing his account, he said he left Ninth Street when Garrett asked him to ride with him and Newman to Capitol

Cadillac (Tr. 414). He said he left Ninth Street in Garrett's car at around eleven o'clock (Tr. 415). At Capitol Cadillac he and Garrett, so he testified, walked through the showroom and browsed around the used car lot where they met Mr. Fennell (Tr. 416). After Newman completed his business, which appellant estimated took about 15 or 20 minutes, they left (Tr. 416). He said that Garrett then took him to 8th and L where he left his car. From there he drove home[14] (Tr. 417). At home, appellant showered and changed clothes. He left home to join his wife for lunch (Tr. 417). He met his wife at the Municipal Center and had lunch with her at Lenit's on D Street (Tr. 417).

Describing the events of the afternoon, appellant related he worked on his car at home, went to pick up his wife from work but missed her, waited until she arrived home, and went with her and their son to dinner. After visiting his mother-in-law's, he returned home with his family (Tr. 418–419). He went out that evening and, when he returned home in the early hours of the morning, he was arrested (Tr. 419).

He testified that at the time of his arrest he was employed by Joe Jackson and was earning $70 a week (Tr. 420).

He denied ever being in the A & P located at 12th and Pennsylvania Avenue, Southeast, and specifically denied participating in the hold-up of April 29, 1965 (Tr. 421–422). He acknowledeged, however, that he had shaved off his mustache since April 1965 but denied ever wearing sunglasses (Tr. 422).

On cross-examination he admitted that on or about June 20, 1953 he had been convicted of robbery in six cases and assault with intent to commit robbery in a seventh case (Tr. 423). He acknowledged that his wife and attorney talked to most of the people allegedly in James' Shoe Clinic on the morning of April 29, 1965, the day he said he was there, and that some of the people could not recall if he was there (Tr. 431). Appellant testified that it was on April 28 that he asked Jackson for the 29th off (Tr. 432). He said he asked for the day off in order to prepare his car for inspection (Tr. 435). His car was due for inspection

[14] Appellant's home is located at 1007 Maryland Avenue, Northeast (Tr. 409).

in April, he said (Tr. 435). Asked why he needed to take a day off to work on his car when he could have worked on his car on a Sunday without missing work, he answered that in his neighborhood people did not do that kind of work on Sunday (Tr. 436). And asked when he told his wife he was meeting her for lunch, he said he called her from his uncle's place earlier on the morning of the 29th (Tr. 430). He said his uncle's place was located at 7th and P Streets, Northwest (Tr. 440).

He later testified on cross that he learned in February that his car needed work in order to pass inspection but that he did not do anything about it until April giving as a reason that he needed time to save the money to finance the parts required for the repairs (Tr. 444–447). He acknowledged that he made $70 a week and that his wife earned $4200 a year (Tr. 447) but indicated that the repairs were substantial (Tr. 448). He testified that he needed a new muffler which ran about $26, a relay switch which cost $2.75, and a gas filter which ran about $27.[15] He estimated that all the parts he needed would cost around $70 (Tr. 450).

Following closing arguments and the court's charge, the jury returned a verdict of guilty on all four counts in the indictment; one count of robbery, two counts of assault with a dangerous weapon and one count of carrying a dangerous weapon.

SUMMARY OF ARGUMENT

I

Appellant argues that the trial court erred in permitting the Government to impeach him by disclosing his prior criminal convictions. He contends that the trial court failed to consider enough criteria to sustain its exercise of discretion. We think by failing to inform the court of the details of his defense, the availability of other witnesses to present it, the specifics of his proposed testimony, or the need for him to testify, appellant failed to invoke the trial court's discretion in a meaningful way. We do not think appellant can now take advantage of the

[15] He also said that, because of a scratch, he might have been required to get a new glass for his front window but he was able to get the scratch out of the window in February by using jeweler's rouge (Tr. 448–449).

vacuum which only he could have filled and argue on appeal that the court did not make the informed ruling to which he was entitled. Appellant contends alternatively that the trial court abused its discretion in permitting the Government to impeach him by disclosing seven convictions, of which six were robbery convictions, stemming from 1953 proceedings. However, appellant's testimony added little, if anything, to his defense. Two witnesses, Joe Jackson and James Garrett whose credibility was severely impeached, had already put appellant's alibi before the jury. If appellant would have been permitted to testify immune from impeachment by prior criminal convictions, the balance in the evidentiary scale would have been artifically weighted in his discretion. Because appellant's defense was before the jury when he chose to testify, there were no countervailing considerations justifying the need to distort the evidentiary scale by withholding from the jury facts vital to the issue of appellant's credibility. In view of this we do not think it can be said that the court abused its discretion.

II

There was, we submit, a sufficient evidentiary basis for the prosecutor in closing remarks to suggest by innuendo that appellant's alibi witnesses might have been his co-participants in the A & P hold-up. The prosecutor in making his remarks did not mention the witnesses' or appellant's criminal records. Rather, in view of the Government's overwhelming case he sought to attach a rational explanation to the testimony which put appellant at James' Shoe Clinic at the time of the hold-up and at Capitol Cadillac about a half an hour later. In any event, even assuming the prosecutor overstepped his bounds, we do not think it can be said that he prejudiced appellant's trial so as to deny appellant his right to a fair trial.

III

Appellant argues that the court erred in refusing his request to hold a hearing to explore the circumstances surrounding his pre-*Wade* line-up. But appellant in making his request failed to allege any facts suggesting that appellant's

line-up was "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967). In short, appellant failed to provide a basis obligating the court to explore the circumstances surrounding the line-up. We do not think it was an abuse of the court's discretion to deny appellant an opportunity for a "fishing expedition."

Furthermore, we find nothing in the record to suggest that the line-up procedures employed at appellant's line-up were unfair or improperly suggestive in any way. And finally, because the evidence in this case is such that it lays to rest the possibility that appellant's conviction rests on identification testimony which was a product of or exaggerated by improper influences, we do not believe this is a proper case to remand for a hearing to explore the circumstances surrounding the line-up identification.

ARGUMENT

I. The trial court did not err in permitting the Government to impeach appellant by disclosing appellant's prior criminal convictions

(Tr. 239, 294, 301–02, 335–40, 410–22)

a. By failing to inform the trial court of the details of his defense, the availability of other witnesses to present it, the specifics of his proposed testimony, and the need for him to testify, appellant failed to invoke the trial court's discretion in a meaningful way and cannot now claim that he was denied the informed decision to which he was entitled

Appellant argues that the trial court failed to exercise its discretion under this Court's decision in *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965) when it permitted the Government to impeach him by disclosing his prior criminal convictions. Appellant contends that the court, in making its *Luck* ruling, failed to consider enough criteria to sustain its exercise of discretion. It is true that the trial court heard argument that went only to the question of how many robbery convictions appellant suffered, and upon learning that appellant suffered seven convictions in 1953, six for robbery and one for assault with intent to commit robbery, all stemming from different indictments, ruled that appellant's criminal record would be admissible for impeachment purposes. But defense counsel,

in invoking the judge's discretion under *Luck*, went no further than to ask the court for a *Luck* ruling, to exhibit an unfamiliarity with appellant's criminal record, and to state that he thought that to admit appellant's assault with intent to commit robbery conviction would be highly prejudicial in view of the charges on which appellant was being tried.

Luck did not outlaw the use of criminal convictions for impeachment purposes in cases in which a defendant chooses to testify. Nor did it put the burden on the Government or the court to search out reasons to exclude from the jury such evidence which bears heavily on credibility. The underlying assumption in *Luck* is that prior convictions are ordinarily admissible and that it is "for the defendant to present * * * sufficient reasons for withholding past convictions from the jury in the face of a statute which makes such convictions admissible." *Gordon* v. *United States*, D.C. Cir. No. 20,126, decided September 18, 1967 (Slip op. at 4). It is not enough for the defendant to ask for a *Luck* ruling and to argue that disclosure to the jury of the defendant's prior criminal record would be prejudicial. *Hood* v. *United States*, 125 U.S. App. D.C. 16, 365 F. 2d 949 (1966). *Luck* brings into play numerous factors many of which are within the exclusive knowledge of the defendant. For example, here when the court made its Luck ruling,[16] the court knew only the nature of appellant's criminal record and the general theory of appellant's defense, that of alibi.[17] Only defense counsel knew the details of appellant's defense, the availability of other witnesses to present it, the specifics of appellant's proposed testimony, and the need to have appellant testify. Only defense counsel knew what affect the exclusion of appellant's criminal record would have on the presentation of appellant's defense and the extent to which the exclusion of appellant's criminal record would distort the evidentiary scale in the context of the entire trial. But defense counsel made no representation as to what appellant's testimony would be, how it would relate to testimony to be given by other defense

[16] Defense counsel asked for a *Luck* ruling after presenting one witness.

[17] The court learned of appellant's alibi defense through the brief opening statement of defense counsel and the testimony of appellant's first witness, Joe Jackson.

witnesses, or why it was important in the context of this case to immunize appellant from impeachment by prior criminal convictions. Not presented with this information, the court ruled in a vacuum—a vacuum which could only be filled by defense counsel. In *Hood* v. *United States*, 125 U.S. App. D.C. 16, 365 F. 2d 949 (1966), this Court reviewed a *Luck* ruling made under almost identical circumstances. The Court, speaking through Judge McGowan who authored *Luck*, wrote (125 U.S. App. D.C. at 18, 365 F. 2d at 951):

> If *Luck* made anything clear, it was that the defense is ill-advised to content itself simply with citing *Luck*. That case establishes only that Congress, in legislating to the effect that prior convictions may be used to impeach, left room for the play of judicial discretion over the unfolding circumstances of the immediate trial. The alert and experienced trial judge presiding over a criminal case has a grasp of how the interests of justice are best served in the case taking shape before him. He may conclude that the defendant's story should be heard by the jury; and *Luck* gives him some flexibility in this regard. But *Luck* is the beginning of the discretionary process, not its end. And where, as here, the defendant treats it as the latter, we are without warrant in the record for setting the judge's determination at naught. There was not in this instance what could be regarded as a meaningful invocation of judicial discretion * * *.

See also *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F. 2d 681 (1966); *Stevens* v. *United States*, 125 U.S. App. D.C. 239, 370 F. 2d 485 (1966); compare *Lewis* v. *United States*, —— U.S. App. D.C. ——, 381 F. 2d 894 (1967)[18] with *Gordon* v. *United States*, D.C. Cir. No. 20,126, decided September 18, 1967 (Slip op. at 4).

There is, we think, a good practical reason for placing on the defendant the burden of invoking the judge's discretion in a meaningful way; that is the burden of coming forward with information vital to an informed ruling. If the rule were

[18] Judges Bazelon and Fahy have indicated that *Luck* may impose some obligation on the court and prosecutor.

otherwise, it would permit the defendant to invoke the court's discretion, withhold information necessary for an intelligent ruling, and later argue that he was denied the informed ruling to which he was entitled. A ruling which countenances such strategy does not, in our view, aid the search for truth.

Appellant suggests that defense counsel below was not responsible for the lack of information provided the court during the *Luck* hearing. Specifically, he states "the record reveals that [defense] counsel's attempted invocation of the Court's discretion was cut short and frustrated by the court's apparent unwillingness to consider any of the factors that should bear on * * * [its Luck ruling]." Appellant's Brief at 20. We do not think the record supports this assertion. To be sure, the record indicates that the court may have reflected some impatience with defense counsel when defense counsel demonstrated his unfamiliarity with appellant's criminal record [19] but it does not, in our view, reflect a predisposition on the part of the court to frustrate or exclude meaningful argument bearing on its *Luck* ruling. Our reading of the record does not reveal even the slightest attempt to the part of defense counsel to inject meaningful information and argument into the *Luck* hearing.

b. The trial court did not abuse its discretion in permitting the Government to impeach appellant by disclosing his prior criminal record, for appellant's testimony absent impeachment by prior convictions would have attached undue weight to appellant's defense which was already submitted to the jury through the testimony of two other witnesses whose credibility was severely impeached

Even assuming appellant invoked the court's discretion in a meaningful way, we do not think the court's ruling was an abuse of discretion.[20] To be sure, six of the seven convictions

[19] See *supra* at 11–13 where the discussion between the prosecutor, defense counsel and the court is set out almost in full.

[20] In our view, if the question of whether the court abused its discretion in making its *Luck* ruling is to be tested on appeal even where that discretion is not meaningfully invoked (see *Lewis* v. *United States*, —— U.S. App. D.C. ——, 381 F. 2d 894 (1967)) it must, in a case such as this, be tested by examining the impact of the ruling in the context of the entire trial. If the defendant is not required to invoke the judge's discretion in a meaningful way, the judge's ruling, it seems to us, cannot be tested on the basis of what the judge knew when he made his ruling but what he should have known had the defendant revealed the significance and importance of his testimony.

used to impeach appellant were for the same crime for which appellant was being tried. And all seven of the convictions stemmed from 1953 proceedings and were thus not of recent vintage. To admit such evidence for impeachment purposes was extremely prejudicial. We do not argue otherwise. But prejudice alone is not the test. *Luck* is a coin with two sides. In authorizing exclusion of prior convictions for impeachment purposes, it admonishes the trial court to consider the need to hear the defendant's story which he might not give fearing the prejudice that could result from the disclosure of his prior criminal record. And it recognizes that there are cases in which the prejudicial effect of revealing a prior conviction outweighs its probative value on the issue of credibility.[21] It takes into account the infinite number of situations which face trial judges in the course of criminal trials and accordingly allows great room for the exercise of discretion.

Here the defendant chose to testify although two witnesses had established his alibi defense testifying that he was in James' Shoe Clinic, located at 9th and Eye Streets, Northwest, at the time the robbery occurred. Joe Jackson, appellant's employer, testified that he saw appellant at the shoe shop some time between 10:15 and 10:35 a.m. and James Garrett testified that he met appellant at the shoe shop some time between 10:20 or 10:30 a.m. and remained there with appellant for 15 or 20 minutes (Tr. 239, 335–37). Garrett further testified that from James' Shoe Clinic appellant accompanied him and Joe Newman to Capitol Cadillac where, according to Garrett, they remained for approximately 40 minutes (Tr. 337–40). Appellant's testimony added little, if anything, to his defense.[22] Appellant

[21] In *Luck*, the Court wrote (121 U.S. App. D.C. at 156, 348 F. 2d at 768):

> There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear or prejudice founded upon a prior conviction. [Footnote omitted.] There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility.

[22] Appellant's wife testified that appellant met her at her office, which was located in the Municipal Center, at approximately 12:30 p.m. (Tr. 204, 417). She recalled that appellant, when he met her, was wearing a brown suit and

sought to corroborate Jackson's and Garrett's testimony and in addition account for his activities on the day of the offense during times which were not crucial to his defense of alibi (Tr. 410–22).

Had appellant proffered this testimony during the *Luck* hearing and the court on the basis of such a proffer ruled that the Government could impeach appellant with his prior convictions, appellant could not successfully contend that the court abused its discretion. This, we think, is the teaching of *Brooke* v. *United States*, D.C. Cir. No. 20241, decided April 19, 1967. In *Brooke*, the defendant was on trial for violation of the federal narcotics laws and requested the opportunity to testify free of impeachment by prior criminal convictions. Called upon for a *Luck* ruling and learning that the defendant had suffered several convictions for selling narcotics, the trial court ruled that such convictions could be used to impeach the defendant if he chose to testify. The defendant decided not to testify. The defendant's choice did not deny him an opportunity to present his defense, for a defense witness, one Pettas, had already testified to substantially the same story the defendant proposed to relate to the jury. As the case stood, it was a battle of credibility between the Government's witness, Private Hampton, an undercover agent for the Narcotics Squad, and Pettas, an addict who cooperated with Hampton by introducing Hampton to narcotics peddlers. In upholding the trial judge's *Luck* ruling, this Court wrote (Slip op. at 12):

> The diametrically opposed testimony of Hampton and Pettas furnished the backdrop against which the judge's determination had to be made. This conflict gave central

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hat (Tr. 301–02). Jackson testified that, when he saw appellant earlier that morning, appellant was wearing a white cap and Garrett stated that in addition to a white cap appellant was wearing green pants (Tr. 239, 335–36). Appellant explained that he went home after he left Garrett where he showered and changed his clothes before meeting his wife for lunch (Tr. 417). Appellant's testimony served the function of seeking to explain the change of clothing which would have had to have taken place if Jackson's, Garrett's, and Mrs. Lewis' testimony was to be believed. We do not think that this was a significant contribution to appellant's defense for it amounted to explaining a detail which the jury would have assumed to be true if it accepted Jackson's, Garrett's and Mrs. Lewis' testimony.

> importance to the fact that appellant proposed to relate to the jury substantially the same version previously narrated by Pettas, and detachment of the embarrassing convictions from his testimony was calculated to artificially inflate its weight in the evidentiary scale. The trial judge's ruling reflects a considered judgment that with credibility so vital, the cause of truth was not likely to be advanced by permitting appellant to testify to events already delineated to the jury if facts germane to the reliability of that testimony were suppressed.

The Court concluded (Slip op. at 13):

> [A]lthough appellant did not testify, Pettas' elaborate testimony filled amply what otherwise would have been an absence of proof to combat the inferences suggested by the circumstances. We find no warrant to interfere.

Brooke of course applies with equal vigor when a defendant chooses to testify, as appellant did here. Here, as in *Brooke*, the battlefield was credibility. When appellant took the stand, the basic conflict was between reliable identification testimony of six Government witnesses and severely impeached alibi testimony of two defense witnesses. If appellant would have been permitted to testify immune from impeachment by prior criminal convictions, the balance in the evidentiary scale would have been artificially weighted in his direction. While there may be cases where there are countervailing considerations to offset the distortion caused by keeping from the jury facts vital to the issue of credibility, we do not think this was one of them.

II. The prosecutor in suggesting by innuendo that appellant's alibi witnesses might have been appellant's co-participants in the A&P hold-up did not overstep his bounds in view of all the evidence before the jury and in any event by making such a suggestion did not deny appellant his right to a fair trial

(Supp. Tr. 21, 23–24)

Appellant contends that the prosecutor made improper use of appellant's convictions revealed on cross-examination thus aggravating the prejudice which he believes was improperly permitted in the case through the court's *Luck* ruling. Ap-

pellant suggests that the prosecutor, using appellant's criminal record together with that of Jackson's and Garrett's, intimated that appellant's alibi witnesses participated with appellant in the A&P hold-up. While the prosecutor did suggest by innuendo that appellant's alibi witnesses might have been participants in the A&P hold-up, he did not mention either their or appellant's criminal records (Supp. Tr. 21, 23–24). Rather on the strength of the Government's overwhelming case, he sought to explain Jackson's and Garrett's alibi testimony and the failure of appellant to bring in other witnesses who were allegedly present in James' Shoe Clinic when appellant said he was there.[23] He was not misrepresenting facts or bringing in irrelevant facts. He was seeking to attach a rational explanation to Jackson's and Garrett's testimony putting appellant in James' Shoe Clinic at the time of the robbery and with Garrett and Newman at Capitol Cadillac about 30 minutes after the robbery. On the basis of all the evidence before the jury, we think it was permissible for the prosecutor to argue as he did.

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[23] The prosecutor said (Supp. Tr. at 23–24):

> Now, ladies and gentlemen of the jury, there is one other little thing I want to mention to you while we are talking about this subject. You heard from Mr. Joe Savoy Jackson that there came a time when this defendant was released and the charges were still pending and he returned to work, which meant the defendant was free, out on the street, just like you are. Now listen. A Mr. Davis, one of the James' brothers, a young shoeshine boy, and a fellow they called Fat Man, four people were there at 10:15 a.m. when I met Garrett. Whose words are those? Those are his words. Where are they? And what excuse have you heard? Where are they? Ten-fifteen is exactly ten minutes before the crime happened. At 10:15 this defendant was in the presence and talked with and saw Fat Man, a shoeshine boy, one of the James' brothers, and a man named Davis. And he hasn't been in any solitary confinement. He was out on the street. Where are they?
>
> Estimate this. Three men pull a holdup job. They rush out to a car. They get into the car and they drive away. They are men that have to establish an alibi, one for each other. Where do they go? We go over to Capitol Cadillac. What time do we get there? How long would it take them? Let's say from the place where the holdup occurred, from that market, to drive into the parking lot of Capital Cadillac Company, what would you estimate the time to be? Let's even say 11:30, 11:15, let's say 11:30. And they are over there looking at cars. And what are they doing, buying cars? Talking. Talking with people, putting themselves at a

But even assuming the prosecutor overstepped his bounds on this occasion, we do not think it cause for reversal. We do not think it can be said that the prosecutor's remarks prejudiced appellant's trial to the extent that the jury could not appraise the evidence objectively and dispassionately. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940). The trial lasted nearly a week. The Government's case, which was based on six identification witnesses, was overwhelming. The remarks which appellant challenges were isolated and were not part of a persistent course of conduct. Indeed, they hardly compare to the remarks made in *McFarland* v. *United States*, 80 U.S. App. D.C. 196, 150 F. 2d 593 (1945), *cert. denied*, 326 U.S. 788 (1946), which were not cause for reversal.

In *McFarland*, a rape and murder conviction for which the defendant was sentenced to death, the prosecutor referred to the defendant's use of aliases, implying that the defendant had a criminal record, and later stated that the defendant "lied his way into the United States Marine Corps * * *." The prosecutor also said, this time in closing argument, that: "Now, even men condemned to die, they can get their last meal, but this defendant did not even give this girl a bit of food, although he said, 'what you need is a steak or seafood dinner'." 80 U.S. App. D.C. at 197, 180 F. 2d at 594.

What the Court said in *McFarland* in reference to the prosecutor's conduct applies equally here (80 U.S. App. D.C. at 197, 150 F. 2d at 594):

> [The prosecutor's] errors do not require and would not justify a reversal of the judgment of this case. Considered in relation to the entire proceeding, it would attribute disproportionate importance to them to say that they deprived appellant of a fair trial.

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place. But can you perceive of yourself in that situation having an uncle and a cousin with whom you were a little bit earlier that morning who could come down and testify to the whole continuity of your day and your uncle and cousin, neither one are here to testify for you. Where are they? Why aren't they here? Have you heard one single explanation?

III. The trial court did not abuse its discretion in refusing to hold a hearing to explore the circumstances surrounding appellant's pre-*Wade* line-up where appellant did not allege facts to indicate that the line-up in which he stood when identified was unnecessarily suggestive, but simply wished to explore what he believed to be Fifth or Sixth Amendment violations

(Tr. 14, 19, 39, 53, 65, 69–70, 81–86, 88, 94, 112–113, 117, 132, 146, 147, 160, 170–171, 173, 183–184, 185–187, 192–193, 194, 310, 422)

Appellant argues that the court erred in refusing his request to hold a hearing out of the presence of the jury to explore the circumstances of the line-up. As a basis for such a hearing, defense counsel stated (Tr. 53):

> Your Honor, in the Stovall Case and in the Wade Case [24] there was conduct which was questioned above and beyond the straight line-up where a person is required by police authorities to stand straight in front of a witness or witnesses who are a certain distance away from the accused to make a determination as to whether this, in fact, is the man or not. Both of these cases involve unusual identification procedures without the right to counsel. Representations have been made to me by the defendant on certain things which transpired at the line-up. For example, he was required to wear his hat in a certain manner to either assist the witnesses in identifying him or appear in a manner that might because the witnesses had indicated to the police that is how the person who committed the alleged crime appeared to them.

Defense counsel appeared to be raising what he believed to be Fifth or Sixth Amendment claims suggesting that appellant, without presence of counsel, was required to wear a hat or assume a certain position in order to aid the witnesses in their identification. Of course, since appellant stood in a pre-*Wade* [25] line-up, there was no infirmity in the witnesses' line-up identifi-

[24] *Wade* and *Stovall* were then pending in the Supreme Court.

[25] *United States* v. *Wade*, 388 U.S. 218 (1967).

cations due to the absence of counsel. *Stovall* v. *Denno*, 388 U.S. 293 (1967). Nor does the allegation that appellant was required to assume certain positions in the line-up make out a Fifth Amendment violation. *United States* v. *Wade, supra.* Thus, neither the Fifth nor the Sixth Amendment obligated the court to hold a hearing to explore the circumstances of the line-up. Appellant does not argue the contrary. Appellant contends that the court was obligated to explore the circumstances surrounding the line-up to ascertain if the line-up was so unfair as to violate due process.

To be sure, a line-up identification is inadmissible if it violates due process, that is if it stems from a confrontation which is "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall* v. *Denno*, 388 U.S. 293, 301–302 (1967). And if defense counsel had alleged facts which, if true, would have supported such a claim, we think he would have been entitled to the hearing he requested. But he did not do this. He requested the court to explore the possibility of what he believed to be Fifth or Sixth Amendment violations and alleged facts which, in our view, did not remotely suggest that the line-up identifications stemmed from a confrontation which was unnecessarily suggestive and conducive to irreparable mistaken identification.[26] Without any allegation of facts to support a due process claim, we do not think defense counsel's request obligated the court to conduct a "fishing expedition" to determine the circumstances surrounding the line-up. See *e.g.*, *Cohen* v. *United States*, 378 F. 2d 751, 761 (9th Cir. 1967); *United States* v. *Phillips*, 375 F. 2d 75, 78–79 (7th Cir. 1967); *United States* v. *Achilli*, 234 F. 2d 797, 806 (7th Cir. 1956), *affirmed*, 353 U.S. 373 (1957).

[26] We read defense counsel's allegation that appellant was required to wear his hat in a certain manner and to assume certain positions to mean that appellant along with the other persons standing in the line-up was required to do these things. We do not understand defense counsel's allegations to mean that appellant was singled out and required to do things other persons standing in the line-up were not required to do. We think such an allegation would have been explicitly communicated to the court. At the very least, we believe defense counsel, if he had such information, would have used it either on cross to impeach the Government's identification witnesses or on direct when appellant himself testified.

Furthermore, we find nothing in the record that remotely suggests that appellant's line-up was unfair. Appellant argues that he should not be required to develop the circumstances surrounding the line-up at his peril in front of the jury, that his failure to elicit the circumstances surrounding the line-up cannot be read to mean that the line-up was conducted fairly. But defense counsel had the names of persons who stood in the line-up, the names of the Government's witnesses, a photograph of the line-up as well as access to appellant. We do not think it can be said he was operating in the dark. Moreover, we can think of no tactical advantage for his not exploring the circumstances surrounding the line-up. He was confronted with six identification witnesses, five of whom positively identified appellant in court as one of the hold-up men,[27] four of whom said they identified appellant in a line-up the day following the robbery. Defense counsel could have cross-examined any of the four Government witnesses who said they identified appellant in the line-up. He could have explored the circumstances surrounding the line-up through Sergeant McMullen, the officer who conducted the line-up and who testified for the Government and appellant. Indeed, appellant himself took the stand and could have testified about the circumstances surrounding the line-up if he thought it to his advantage.

But not only is there a total absence of evidence indicating any unfairness in the line-up procedures, the likelihood that the witnesses' line-up identifications were a product of improper influences rather than their own memories is, we think, nil.[28] The line-up at which the witnesses made their identifications was held within 24 hours of the robbery. The four witnesses, Smith, Stowell, Starks and Burton, who testified that they identified appellant in the line-up, observed appellant under conditions which attest to a reliable identification.

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[27] John Luchie testified that appellant "appeared" to be one of the hold-up men (Tr. 147). On cross, in answer to the question of whether he was certain about his identification, Luche said: "Well, if it is not him [appellant] maybe he is his twin. A lot of people look alike" (Tr. 160).

[28] We think this is significant because it lays to rest the possibility that appellant's conviction rests on identification testimony which was a product of or exaggerated by improper influences—the very thing *Wade* and *Stovall* are designed to circumvent.

Smith, the manager of the A & P, testified that during part of the hold-up he stood as close as two feet to appellant and that, in excellent lighting conditions, looked directly at appellant's face for approximately 30 seconds or a minute (Tr. 39, 65, 69–70). William Stowell, the manager of the meat department, observed appellant for several minutes and came within three feet of appellant and stared directly at appellant's face immediately after appellant ordered him to cut off his phone call to the police and walk to the front of the store (Tr. 81–86, 88, 94). Starks testified that he stood within four or five feet of appellant and observed appellant in close proximity for approximately 45 seconds (Tr. 112–113, 132). Charles Burton observed appellant as appellant approached the backroom where he found Stowell trying to put through a call to the police (Tr. 183–184). Burton testified that in addition to observing appellant's face as appellant approached the door leading to the backroom, he saw appellant's face on two separate occasions while walking toward the front of the store turning around twice when appellant shouted at him (Tr. 185–187).

And finally, we note that the identification testimony coming from witnesses who testified about the line-up was corroborated by other evidence. Two witnesses, John Luchie and Elaine Cissel, identified appellant without making reference to a line-up identification. All the Government's identification witnesses observed that appellant had shaved off his mustache since the date of the offense, which was April 29, 1965 (Tr. 19, 86, 117, 146, 173, 194). And appellant testified that he had shaved off the mustache he wore in April 1965 (Tr. 422). All the Government's identification witnesses specifically noticed that the hold-up man they identified as appellant was well dressed, attired in a suit, tie and hat (Tr. 14, 84–86, 112–113, 146, 170–171, 192–193). And Mrs. Lewis, appellant's wife, testified on cross that appellant usually dressed in a suit and tie and always wore a hat (Tr. 310).

In sum, we find nothing in defense counsel's request for a hearing that obligated the court to hold such a hearing. And upon examination of the entire record we find nothing to suggest that appellant may have been prejudiced by admitting the

the testimony relating the line-up identifications. Accordingly, we do not think this is a proper case to remand for a hearing to explore the circumstances surrounding the line-up identifications.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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